No. 342

JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama,

Appellants,

v.

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. COLVIN, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division

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PETITION FOR CLARIFICATION AND REHEARING

WALTER J. KNABE,
511 Hill Building,
Montgomery, Alabama,
Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellants,

v.

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. COLVIN, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division

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PETITION FOR CLARIFICATION AND REHEARING

In its Order of November 13, 1956, this Court affirmed the judgment below on authority of *Brown* v. *Board of Education,* 347 U.S. 483; *Mayor and City*

Council of Baltimore v. *Dawson*, 350 U.S. 877; *Holmes* v. *Atlanta*, 350 U.S. 879.

It is respectfully submitted that this Order, entered when only Appellants' Jurisdictional Statement and Appellees' Motion to Affirm were before this Court, leaves unanswered the grave procedural and substantive problems created by the decision below.

I.

Heretofore, this Court has held firm to the principle that in the absence of a showing of irreparable injury, both great and immediate, federal courts must not enjoin the enforcement of state and local criminal laws. The judgment below was squarely counter to *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943)—a leading case which enunciated this principle in a First Amendment context.

Regardless of the constitutional judgment of the ordinances of the City of Montgomery drawn in question in this case, properly accommodation of state and federal judicial systems requires that this decision come after state criminal procedure, with ultimate review in this Court.*

It is impossible to ascertain whether the well-established principle of *Douglas* v. *Jeannette* is still to restrain federal courts in their use of the powerful instrument of injunction.

It is impossible to determine whether *Douglas* v. *Jeannette* is overruled, *sub silentio*, or whether it is inapplicable to some asserted violations of due process

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* Compare *Douglas* v. *Jeannette* with *Murdock* v. *Pennsylvania*, 319 U.S. 537 (1943).

and equal protection by state and local bodies in some contexts and not to others.

May pending prosecutions now be restrained by federal district courts where a defendant asserts an alleged violation of a right protected by the Fourteenth Amendment? But cf. *Stefanelli* v. *Minard*, 342 U.S. 117.

And if local and state officials are to be subjected to federal injunction when they act in good faith to enforce the provisions of criminal enactments, are they, under this Court's decision of November 13, to be subjected to damage suits under the Civil Rights Act?

These are among the vital questions left unanswered in this case. It is most earnestly requested that this Court note probable jurisdiction and permit thereby the full argument of these basic principles of federalism.

II.

The decision of November 13 also leaves unanswered the question of whether *Plessy* v. *Ferguson*, 163 U.S. 537, has any continued efficacy in its own factual context, namely, intrastate transportation. The City of Montgomery, motivated by a sincere desire to preserve segregation on public buses as far as possible within the framework of the Constitution of the United States, is left without guidance as to whether this particular form of segregation violates the Constitution, or whether all forms of segregation of the races on public transportation systems are invalid. A possible deduction from this Court's order is that *Plessy* v. *Ferguson*, has been overruled *sub silentio*. But this Court has not yet said so. Indeed, this Court was careful not to do

so in *Brown* v. *Board of Education,* 347 U.S. 483—*Plessy* involved "not education but transportation."

Those laymen who must now risk injunctions, prospective damage suits, and even criminal prosecution because of their future administration of state and local laws, should not be left in the position of having to decide for themselves whether this Court's affirmance means that *Plessy* v. *Ferguson* has been overruled, or whether in some other factual context it might be applied. These matters deserve the elucidation which will come from a full argument of this case on the merits.

It is respectfully requested that the order of the Court be reconsidered, and that this Court note probable jurisdiction to decide the substantial questions here involved.

Respectfully submitted,

WALTER J. KNABE,
511 Hill Building,
Montgomery, Alabama,
Counsel for Appellants.

I hereby certify that this petition for clarification and rehearing is prepared in good faith and not for delay.

I further certify that I have served a copy of the foregoing petition for clarification and rehearing upon Attorneys Fred D. Gray and Charles D. Langford, of record for appellees, by depositing the same in a United States Post Office with first-class postage prepaid, addressed to them at 131½ Monroe Street, Montgomery, Alabama.

WALTER J. KNABE

JOHN T. FEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 848

C. C. (Jack) Owen, Jimmy Hitchcock, and Sibyl Pool, as members of the Alabama Public Service Commission,
Appellants,

VS.

Aurelia S. Browder, and Susie McDonald and Claudette Colvin, by Q. P. Colvin, next friend, and Mary Louise Smith, by Frank Smith, next friend, and others similarly situated,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

PETITION FOR REHEARING

JOHN PATTERSON
Attorney General of Alabama
WILLIAM N. McQUEEN
Assistant Attorney General
GORDON MADISON
Assistant Attorney General
WM. F. BLACK
Counsel for Appellants

WALKER PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 343

C. C. (Jack) Owen, Jimmy Hitchcock, and Sibyl Pool, as members of the Alabama Public Service Commission,
Appellants,

VS.

Aurelia S. Browder, and Susie McDonald and Claudette Colvin, by Q. P. Colvin, next friend, and Mary Louise Smith, by Frank Smith, next friend, and others similarly situated,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

PETITION FOR REHEARING

Now come the appellants in the above-styled cause and respectfully apply to this Court for a rehearing and reconsideration of its decision of November 13, 1956, affirming the judgment of the three-judge District Court.

The appellants respectfully submit to the Court that laws permitting, and even requiring the separation of the races in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and such laws prior to the decision rendered in this cause have for years been generally, even universally, recognized as within the competency of the State Legislatures in the exercise of their police power. This has been the expressed opinion of many distinguished and learned justices who have heretofore sat on the Supreme Court of the United States.

We earnestly insist that the State's police power has been wrongfully taken from it, and there now exists a "No man's land," in which the State, under the Court's opinion, is powerless to protect property and prevent breaches of the peace which will inevitably result from the Court's decision rendered in this cause. The Tenth Amendment has been written out of the Constitution.

The principles of law stated in *Plessy v. Ferguson*, 163 U. S. 537, should receive the sanction and approval of this Court as now constituted.

The appellants, therefore, respectfully request that this, their application for rehearing, be granted.

Respectfully submitted,

JOHN PATTERSON
Attorney General of Alabama
Judicial Building
Montgomery, Alabama

WILLIAM N. McQUEEN
Assistant Attorney General of Alabama
Judicial Building
Montgomery, Alabama

GORDON MADISON
Assistant Attorney General of Alabama
Judicial Building
Montgomery, Alabama

WM. F. BLACK
State Office Building
Montgomery, Alabama

Counsel for Appellants, C. C. (JACK) OWEN, JIMMY HITCHCOCK, AND SIBYL POOL, as Members of the Alabama Public Service Commission.

I, Gordon Madison, one of the attorneys for appellants, C. C. (Jack) Owen, Jimmy Hitchcock and Sibyl Pool, as members of the Alabama Public Service Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29 day of November, 1956, I served copies of the foregoing petition for rehearing on the several appellees thereto by placing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

TO: Charles D. Langford *Attorney for Appellees*
113 Monroe Street
Montgomery, Alabama

Fred D. Gray *Attorney for Appellees*
113 Monroe Street
Montgomery, Alabama

Robert L. Carter *Attorney for Appellees*
107 West 43rd Street
New York 36, New York

Thurgood Marshall *Attorney for Appellees*
107 West 43rd Street
New York 36, New York

I further certify that this petition for rehearing is presented in good faith and not for delay.

Gordon Madison

GORDON MADISON
Assistant Attorney General of Alabama
State of Alabama
Judicial Building
Montgomery, Alabama